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APPELLANT'S BRIEF.

Filed April 27, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

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GEORGE F. EMBLEN, APPELLANT,

vs.

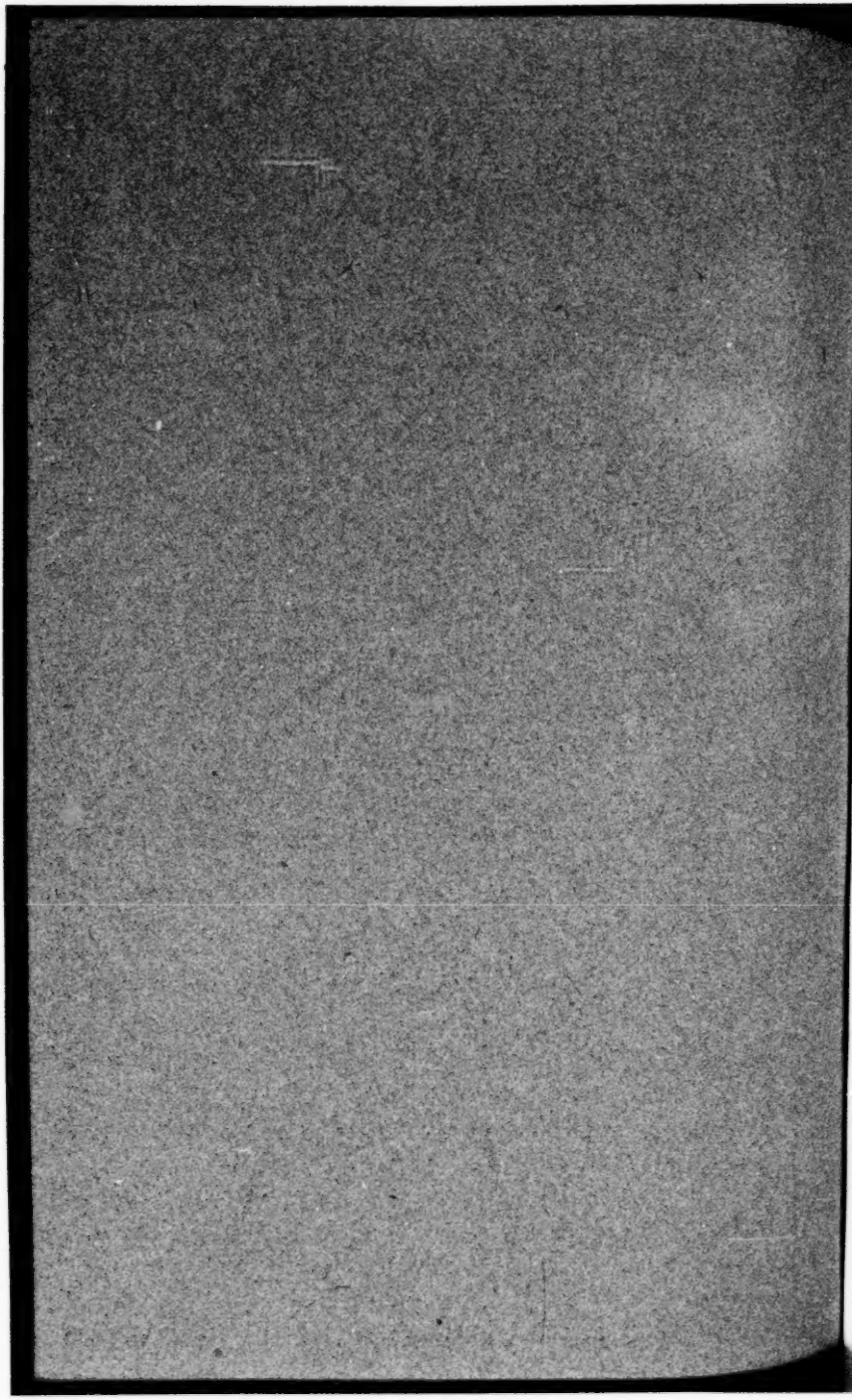
THE LINCOLN LAND COMPANY ET AL., APPELLEES.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

T. J. MAHONEY AND E. R. DUFFIE,

FOR APPELLANT.

(17,888.)



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NO. 403.

GEORGE F. EMBLEN, *Appellant*,

vs.

THE LINCOLN LAND COMPANY ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

T. J. MAHONEY AND E. R. DUFFIE, *For Appellant*.

STATEMENT OF CASE.

As this is an appeal from the decision of the Circuit Court of Appeals, affirming a judgment of the Circuit Court sustaining a demurrer to the amended bill, a complete statement of the facts would be simply a repetition of the averments contained in the amended bill of complaint which is set out in full, commencing at page six, in the printed record. A condensed statement of the averments, may, however, be of some service. They are:

1st. That George F. Weed made pre-emption cash entry for the land in question at the Denver land office, September 19, 1885.

2. That appellant made contest against said entry October 4, 1888.

3. That the grounds of the contest were that the entry was fraudulent, that the entry was made for speculative purposes; that Weed had not complied with the law as to residence.

4. That the purpose of the contest was to defeat

Weed's entry and to enable appellant to enter the lands under the second section of the Act of May 14, 1880.

5. At the hearing on the contest at the Denver office, the contest was dismissed on its merits, appellant appealed to the Commissioner of the General Land Office, where a hearing resulted in a decision reversing the decision of the Denver office and holding Weed's entry for cancellation as fraudulently made.

6. Weed moved for a new trial and a petition of intervention was filed on behalf of the town of Yuma, which had been established on the land, praying that petitioners be permitted to intervene and support the entry.

7. The Commissioner of the General Land Office then made a ruling that Weed was not entitled to a new trial, but that a further and additional hearing would be had at the Denver office to allow Weed and intervenors to offer additional testimony to rebut the evidence previously given in support of the contest. Before the further hearing was had a new district was created, with local office at Akron, and this contest was transferred to that office. Appellant refused to proceed to Akron and refused to recognize the jurisdiction of the local officers at that office, because the receiver at that office was an interested party and in effect one of the intervenors.

8. The local land office at Akron then made an order dismissing the contest, from which Emblen appealed to the Commissioner of the General Land Office, who affirmed the decision of the Akron office, and denied Emblen an appeal to the Secretary of the Interior.

9. Emblen then proceeded by *certiorari* before the Secretary of the Interior, who ordered the record certified to his office and who, on receipt of the record, affirmed the decision of the Commissioner of the General Land Office.

10. Thereafter, Emblen moved, before the Secretary of the Interior, for a new trial, largely on the ground of newly discovered evidence. The new trial was granted in an order by the Secretary of the Interior holding that appellant was entitled to it on the ground of newly discovered evidence, and also holding that the interest of the

receiver, at the Akron office, was such as to deprive him of jurisdiction to try the contest (printed record, p. 28). This order left the matter just where it was left by the first ruling of the Commissioner of the General Land Office, with Weed's entry held for cancellation on the ground that he had not made a *bona fide* settlement, and allowing Weed and the intervenors to offer proof to rebut the evidence on which the entry was held for cancellation.

11. The further hearing was continued from time to time and Weed and the intervenors, instead of availing themselves of the opportunity to offer their evidence and show why the entry should not be cancelled, procured the passage of an Act of Congress, approved December 29th, 1894, in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the pre-emption cash entry numbered 4990, of George F. Weed, made at the District Land Office at Denver, Colorado, on the 19th of September, 1885, for the southeast quarter of section twenty-two (22), township two (2), north of range forty-eight (48) west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma County, Colorado, be and the same is hereby confirmed and that patents of the United States issue therefor to the said Weed."

12. In pursuance of this Act a patent was issued to Weed.

13. The other defendants in this suit acquired whatever interests they have from Weed and pending the contest before the patent was issued and with notice of Emblen's rights.

14. The amended bill alleges, and for the purpose of the demurrer, it was admitted that Weed's entry was fraudulent and for speculative and townsite purposes and made under an agreement with defendant, the Lincoln Land Company, by which he was to convey an undivided one-half to said company for the purpose of a townsite, and on a further hearing before the local land office, it would have been impossible for Weed and the intervenors to overcome

the proof already in as to the fraudulent character of the entry.

15. The bill also discloses that at the hearing at the Denver office Emblen made an offer to relinquish his rights under the Act of 1880 if he would be permitted to prosecute his contest under Rule 55 of the Land Department, whereby he would be required to pay only his own costs, but this offer was refused by the local officers and he was required to retain his status as a contestant claiming the benefit of the Act of 1880 and prosecute under Rule 54 and bear all the costs. He acquiesced in that ruling and bore all the costs in accordance with Rule 54 and the Act of 1880. The relief prayed for was an accounting for portions of the land sold by the defendants, that the defendants be decreed to hold the land in trust for the complainant, and that they be decreed to execute the trust by conveyance to complainant.

Points Raised.

The points raised can best be stated by giving a synopsis of the decision handed down by the District Judge, and adopted by the Circuit Court of Appeals, as follows:

1. That Congress has the power to withdraw the jurisdiction of the land department over contested entries and adjudicate upon them itself.

2. That it is questionable whether one secretary of the interior has the power to grant a new trial or rehearing in a matter passed on by his predecessor.

3. That a contestant under the Act of 1880 acquires no rights by instituting a contest, paying the costs and prosecuting his contest to a decision holding the entry for cancellation by proving the fraudulent character of the entry.

4. That nothing short of an absolute cancellation of the entry will give a contestant under the Act of 1880 any right, which will be protected by a court of equity as against the entry-man who wrongfully obtains the patent.

5. To the foregoing might be added the contention of the defendants, not referred to in the decision by the district judge, that Emblen lost his rights under the Act of

1880 by his offer to relinquish those rights on condition of being permitted to prosecute the contest, under Rule 55 of the Land Department.

Assignments of Error.

For purposes of review the assignments of error (printed record, p. 37) may be reduced to one: The Court erred in sustaining the demurrer.

The Argument.

1. The trial Court held that the Act of Congress in confirming the Weed entry was equivalent to a withdrawal of the jurisdiction of the Land Department, and cited the case *In re Hall*, 167 U. S., 38, and other cases of the repeal of acts giving certain courts certain jurisdiction, as authority. These were all cases in which jurisdiction was lost, by reason of a repealing Act, and the case, *In re Hall*, was one where the Act repealed granted a mere gratuity, without any consideration. Authorities of this class can have no legitimate bearing on the case at bar. The Act here complained of was not a repeal of previous Acts, granting jurisdiction to the Land Department. It did not assume to deal with the question of jurisdiction at all. Its language is not the language of legislation. It is the language of a decree. True, the Constitution vests Congress with "the paramount control over the disposition of the public lands of the United States." But how? Does it give Congress authority to adjudicate conflicting claims between private parties as to rights acquired in land that was once public land? The language of the Constitution is: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." Now, Congress has made certain rules and regulations concerning the public lands, one of which is the Act of 1880. Grant that Congress may repeal or modify this rule; grant that it may repeal all other rules, or acts, vesting certain authority in the Land Department. But it has not attempted to do so. The Act complained of does not go upon the theory that the land in question belongs to the United States, so that Congress might even

donate it to Weed. It recognized that the validity of Weed's entry was contested, that the government had no longer any beneficial interest in the land, and it simply assumed to pass, judicially, upon the merits of the controversy between Weed and Emblen. Had Congress any power to enter such a decree? The government had parted with everything but the naked legal title. The Constitution only gives Congress the right to dispose of what belongs to the United States. It cannot dispose of more. The United States owned the naked legal title which it held in trust for the person who, under previous legislation and compliance therewith, was entitled to the beneficial interest. It could dispose of only the naked legal title and thereby make its grantee its successor as trustee. But could it adjudicate as to the equitable rights of contesting claimants? Section 1 of Article 3 of the Constitution vests the judicial power of the United States in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

In the Dartmouth College case, Webster, speaking of the legislative power, and distinguishing it from the judicial power, said: "It shall not judge, by *act*; it shall not *decide* by *act*; it shall not deprive by act; but it shall leave all these things to be tried and adjudged by the law of the land." In the Act in question, if it is to be construed in terminating Emblen's rights, Congress has attempted to *judge* by *act*, to *decide* by *act* and to *deprive* by *act*. This thought must have been in the minds of the judges of this Court when they said, respecting this same controversy, in the case, *In re Emblen*, 161 U. S., 52: "The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor."

2. While the decision of the District Judge is not based upon the point, a question is suggested as to the authority of Secretary Smith to grant a rehearing on a matter passed upon by Secretary Noble. The application for a rehearing was filed just two days before Secretary Noble went out of office. (See Exhibit A, printed record, p. 21.) It was ruled on some time later by Secretary Smith. The only objection then raised to the authority of the secretary was based on the question of time allowed under the rules of the department for presenting a motion to review. (Printed record, p. 26.) This question was disposed of on the ground that the rules of the department do not limit the time for such a

motion based on newly discovered evidence. But the District Judge and the court of appeals in adopting his opinion in this case seem to think that the termination of the term of office of one secretary of the interior leaves his successor without jurisdiction, to determine pending controversies. It might as well be said that when the judge of a trial court goes out of office his successor cannot grant a new trial on the ground of newly discovered evidence. This would be making the person, and not the office, the tribunal. It would be saying that judicial power, and executive function are vested in certain persons and not certain courts or officers. The authority to pass on contests in respect to pre-emption entries, was vested not in Secretary Noble, but in the Secretary of the Interior.

3. Did Emblen acquire no rights by his contest at his own expense which a court of equity ought to protect?

The fallacy, it appears to us, in the position taken by the Circuit Court and the Court of Appeals is in dealing with this land as though it were public land, the property of the United States and subject to the control of Congress and in wholly ignoring the distinction between legal and equitable rights. The bill alleges that the defendant, George F. Weed, made a pre-emption cash entry for the southeast quarter of section twenty-two (22), township two (2), north of range forty-eight (48) west, on September 19th, 1885, at the local land office at the City of Denver and received a final receipt from the register of said office under the laws, rules and regulations of the Land Department of the United States then having such lands within its jurisdiction, etc.

It has been held in numerous cases that where the entryman has paid for the land and received a final receipt that he is then the equitable owner and the government holds the naked legal title in trust and has no other interest in the premises, and this is the case whether the entry be a cash entry or a donation.

Witherspoon vs. Duncan, 4. Wall., 210. In that case it was said: "But it is insisted that there is a difference between a cash and donation entry. That the one may be complete when the money is paid but the other is not perfected until it is confirmed by the General Land Office and the patent issued. * * * If the law on the subject is complied with and the entry conforms to it, it is

difficult to see why the right to tax does not attach to the donation as well as to the cash entry. In either case when the entry is made and certificate given the particular land is segregated from the mass of public land and becomes private property."

Weed was the owner of the land and his title was subject to be defeated only by showing that such title was acquired fraudulently. Prior to the act of May 14th, 1880, no one but the government had any right to question Weed's title or to assail it as fraudulent.

Sioux City & Iowa Falls Town Lot & Land Co. vs. Griffey, 143 U. S., 32. In that case it is said:

"It was no matter of interest to the Company what became of the title. The Government, the owner of the land, was satisfied with what Griffey had done, took from him its land warrant as payment and patented the land. Into the bona fides of this transaction no one but the government can inquire."

The government, however, had and has a right to inquire into the bona fides of all pre-emption and homestead entries even after the issue of a patent, and having that right it can transfer it to any third party who becomes thereby invested with an interest which after acceptance cannot be divested by Congress or by anyone except in a lawful manner. If Weed became the owner of this land by fraud perpetrated upon the United States and the United States had a right to question his title and to cancel it if the fraud was found, then it had the right to transfer this cause of action to a third party and after acceptance by the third party, and especially after the assignee of the right had expended his time and money in an effort to show the fraudulent character of the title held by Weed, Congress could no more take from him this right than it could divest him of any other property which he held and which came to him fairly and honestly.

In *U. S. vs. Fitzgerald*, 15 Pet., 408, the facts were as follows: Fitzgerald had been appointed in 1833 inspector of customs for the district of Mississippi, and by the collector of New Orleans he had been employed as boarding officer at the Southwest Pass on the Mississippi river and

went into possession of a tract of land which had been occupied by a prior boarding officer in the service of the United States. The collector was not instructed by the Treasury Department to place the boarding officer on that or any other tract of land, nor was he bound to reside there. The United States had provided no accommodations for the boarding officer. The collector had not, before position was so taken, requested that the land should be reserved for the use of the boarding officer of the custom house at New Olreans. Fitzgerald on the 18th of June, 1836, entered the tract of land with the register of the land office in New Orleans and he and his wife expended their own money on the improvements of the tract and complied with all the requisitions of the law of the United States granting pre-emption rights. Proof was made before the register at the land office of the possession and cultivation of the tract and the purchase money was paid to the United States. The acting commissioner of the land office on the 3rd of November, 1836, wrote to the register of the land office at New Orleans stating that the Secretary of the Treasury had directed that the land should be reserved from sale for the use of the custom house at New Orleans and requesting that it should be marked as reserved from sale on the plats of land in his office. This attempted reservation was made after the cash entry by Fitzgerald. The government, desiring to use this land for light house purposes, brought an action of ejectment against him to eject him from the land. The circuit court dismissed the petition and decreed that Fitzgerald should be quieted in the possession of the premises. On appeal the decision was affirmed.

In *Carroll vs. Stafford*, 3 How., 441, it is said:

"When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held for it a final certificate which could no more be cancelled by the United States than a patent. It is true if the land had been previously sold by the United States or reserved from sale, the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference whatever between the certificate holder and the patentee. It might be added that in the case of a homestead preemption entry after final certificate or even after patent has

been issued, it could be recalled if upon investigation it was found that the holder had obtained the same by a fraud practiced upon the government. At least a court of equity upon an allegation of a fraudulent entry would cancel the certificate or the patent issued by the officers of the government in ignorance of the fraud."

In *Wisconsin Central R. R. Co. vs. Price County*, 133 U. S., 496, it is said:

"After public lands have been entered at the land office and the certificate obtained, they are private property, the government agreeing to make a conveyance as soon as it can and in the meantime holding the naked legal fee in trust for the purchaser who has the equitable title."

Mr. Justice Field makes the following quotation from *Witherspoon vs. Duncan*, 71 U. S., 210-218:

"In no just sense can lands be said to be public lands after they have been entered at the land office and their certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale the government has no power to revoke the entry and withhold the patent. A second sale if the first was authorized by law, confers no right on the buyer and is a void act."

And again:

"The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser who has equitable title."

No case can be found holding that after entry and payment for the land Congress has any jurisdiction to legislate in relation thereto. After the government has received its money the equitable title has passed to the purchaser and he holds the land as free from interference by Congress as from any other source. In the present case Weed had entered and paid for the land and Congress had no right or jurisdiction to interfere with the title. It is true that under laws existing at the time Weed made his entry the government had a right to institute an inquiry to ascertain whether the entry was fraudulent and whether Weed had acted in good faith in his dealings with the government. If this investigation was instituted by the land department prior to

the issue of a patent to Weed and resulted in finding that his entry of the land was fraudulent, that he had pre-empted it for speculative purposes, the land department might refuse to issue the patent and might perhaps cancel the entry. If a patent had issued prior to an investigation then Weed's title conveyed to him by the patent could be set aside only by an action in court and this action could be instituted by the government at any time so long as Weed held the legal title. These conditions make it apparent that until Weed's title was set aside he was the owner of the land and that no legislation by Congress could in any manner affect the title. The right of the government to institute proceedings to cancel his title for fraud conferred upon Congress no right to dispose or attempt to dispose of the land until the fraud was established and his title set aside. It is true Congress could, if it had not conveyed away its rights, waive the fraud of Weed, if any there was, in obtaining title to the land, and either allow a patent to issue in the usual course of the business of the land department or direct the issuing of a patent at once, but our contention is that the Act of 1880 was an offer to any resident of the United States qualified to take the benefit of the pre-emption or homestead laws to become the assignee of the government, in any right of action which it might possess against a fraudulent pre-emptor, or a fraudulent homesteader, and to prosecute that right to judgment, and as a compensation therefor to acquire a preference right of entry to the land which his proceedings thus instituted and prosecuted might show to have been fraudulently acquired from the government by the contestee.

The learned Circuit Court proceeds upon the theory that the complainant in this case obtained no privilege under the Act of 1880 until he had succeeded in cancelling the prior entry in favor of Weed. That there was no vested right in the land and no vested right in the cause of action or the right to contest for the land which would prohibit Congress from dealing with it as though no steps had been taken by the complainant under the Act of 1880. This we conceive to be error.

It is true that under the Act of 1880 the absolute legal right of a contestant to avail himself of the preference given

by the Act is not complete until the entry attacked is cancelled. But it by no means follows that a contestant acquires no rights prior to the formal entry of the cancellation. There are many rights which a Court of Law can neither recognize nor enforce. They are not complete in the legal sense, and yet their protection is so much a matter of good conscience that the Courts of Equity unhesitatingly interfere for their enforcement. The Act in question provides, in express terms, when a complete legal right or legal title to a given remedy shall vest: and that is upon the completion of the contest resulting in a cancellation of the entry. But when such a result is brought about the contestant has no occasion to apply to a Court of Equity for his protection. The cancellation of the entry has terminated all rights of the entryman, and if the officials of the land department should then refuse the contestant an opportunity to avail himself of the preference right given by the Act, his remedy would be in a Court of Law, which would unquestionably grant him a writ of mandamus, compelling the officials of the land department to respect his preference right, and give him an opportunity to avail himself of it. We concede that in the sense of having acquired a complete legal right, enforceable by the Courts of Law, such complete right would not vest until the entry is actually cancelled, and we concede that in this case the entry never was cancelled. Had the contest been terminated by a decision of the land department cancelling Weed's entry, there would have been no occasion for Emblen to seek the protection of a Court of Equity. His remedy would have been complete at law. But the contest never was conducted to a final decision in the land department. Its prosecution was interfered with by the special Act of Congress, which assumed to adjudge Weed's entry valid. Emblen then sought a remedy at law in the form of a writ of mandamus, to be issued by this Court, but your honors decided (*in re Emblen*, 161 U. S., 52) that he was seeking the wrong remedy. In that case your honors said:

"Such being the state of the case, it is quite clear that (even if the Act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between

the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. This is clearly settled by previous decisions of this Court, including some of those on which the petitioner most relies."

We cannot help feeling that both the Circuit Court and the Circuit Court of Appeals entirely failed to appreciate the force of the above language, stating the doctrine of this Court. Your honors declined in that case to say, or even to intimate whether the act assuming to quiet Weed's title was valid or not; but it seems to us that your honors do hold that if that act were invalid Emblen was vested, by virtue of his contest, with such equitable rights as would entitle him to relief at the hands of a Court of Equity, charging a trust upon the title acquired by Weed, and compelling Weed to execute the trust. In other words, this Court in holding that Emblen had not acquired a right enforceable at law, but that his remedy was in equity, if the Act in question was invalid, has decided that before the final termination of a contest a contestant has acquired some rights which as between himself and the contestee a court of equity ought to protect.

But the Circuit Court and the Circuit Court of Appeals looked only to the letter of the law, and refused to recognize any but strictly legal rights, and because the legal right to demand and enforce by an action at law the preference offered by the Act of 1880 was not complete until a final judgment of cancellation had been entered against the entryman, both the Circuit Court and the Circuit Court of Appeals held that no right had vested in the contestant. The distinction between legal and equitable rights and legal and equitable remedies is the key to the problem presented by this case. Our contention is, that when Emblen initiated the contest and paid the costs thereof he acquired the

rights and standing given to a contestant by the Act of 1880. He acquired the right of prosecuting his contest to a final determination, and a cancellation of the entry, if the contest was well founded, as the bill in this case alleges it was. We think it must be conceded that he had acquired the exclusive right to contest Weed's entry, and that while he was prosecuting his contest no other person could oust him from his position as contestant, and get the benefit of the contest, as far as prosecuted by him. We believe that any interference by the officials of the land department, or the contestee, or a third party, to prevent him from continuing to prosecute the contest would be such an invasion of his rights as would be enjoined by a court of equity. Grant that the contest has not proceeded so far as to give him, as a matter of law, the preference right to enter the land, the question which is presented by his bill in equity is, did it not give him the equitable right to charge Weed with a trust in his favor?

The object of the act of 1880 was to induce parties to give their time and expend their money in ferreting out fraudulent homestead and pre-emption entries. By this act Congress said to everyone who desired to take advantage of it: The government has a right to institute an action, has a cause of action against every fraudulent pre-emptor or homesteader. This right we will assign to you provided you will assume the burden of discovering and proving the fraud. When this offer is accepted and when time and labor and money have been expended upon the faith of it the contract becomes a binding contract which the government cannot avoid. It is not necessary in order to make a binding contract that money should be paid for it. If money is expended on property on the faith of a contract it constitutes a valuable consideration.

King's Heirs vs. Thompson, 9 Pet., 204.

Haines vs. Haines, 6 Md., 435.

In the case of *King vs. Thompson*, George King a few days after the marriage of his daughter to Thompson proposed to grant to him a house and lot in Georgetown then much out of repair and untenantable provided he would repair the same so as to make it a comfortable residence and

saying that he intended the property for his daughter. This proposition was accepted by Thompson, who repaired the property, expending upwards of $4,000 on the same. This was held by the Supreme Court to be a valid contract based upon a valuable consideration. It is true that those seeking the benefit of section 2 of the Act of 1880 do not pay the government anything in the way of money for the right of action which they take from the government to establish the fraudulent character of homestead and pre-emption entrymen, but they do devote their time and expend their money in unearthing these frauds and after they have entered upon the performance of a contract the government cannot withhold from them performance upon its part by so disposing of the land as to make their efforts fruitless. They have a vested right in the cause of action which the government has placed in their hands to prosecute, and they have a vested right in whatever fruits may result from the judgment ultimately entered in such an action or such a proceeding.

It is sometimes said that estoppels do not run against the government. This may be true in regard to purely governmental matters, but when the government descends from the plane of sovereignty and contracts with its citizens, such government, in respect to such act, is regarded as a private person itself and bound accordingly. *Davis vs. Gray*, 16 Wall., 203; *Hall vs. Wisconsin*, 103 U. S., 5; *People vs. Stephens*, 71 N. Y., 527.

The case of *Pennoyer vs. McConnaughy*, 140 U. S., 1; 11 Sup. Ct. Rep., 699, strongly supports our contentions both that a contract existed between Emblen and the government and that Emblen is entitled to the protection of the courts to prevent a successful violation of the contract. In that case it appeared that in 1870 the Legislature of the State of Oregon by general law, prescribed terms on which swamp lands allotted to the state could be purchased by citizens. Among the requisite conditions, were the filing of an application and thereafter the payment of 20 per cent of the purchase price. In 1878 another act on the subject modified the time of payment of the 20 per cent. This act took effect January 17, 1879. By a still later act in 1887, it was provided that all certificates on which the 20 per cent

had not been paid prior to January 17, 1879, the date of the taking effect of the second act, should be declared null and void and should be cancelled. The complainant's grantor had made application under the act of 1870, but the 20 per cent was not paid until after the 17th of January, 1879. The relief sought was an injunction against the state board of land commissioners to prevent a disposition of the lands to other parties. The case was disposed of on bill and demurrer. In overruling the demurrer the District Judge said: "The transaction as set forth in the statute has all the elements of a contract of sale. The statute is a formal standing offer by the state of these lands for sale on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof, with the board, and complying with the subsequent condition of payment and reclamation. The application is a written acceptance of the offer of the state, in relation to the land described therein, and on the filing of the same, the minds of the seller and purchaser—the state and the applicant—came together on the proposition and thenceforth, there was an agreement between them for the sale and purchase of that part of the land, binding on each of them until released therefrom by some substantial default of the other, not overlooked or excused."

The correctness of that part of the opinion which declared the existence of a binding contract from the mere filing of the application was questioned by this Court on the strength of *Yosemite Valley* case, 15 Wall., 77, and *Frisbie vs. Whitney*, 9 Wall., 187. But this Court held that whether or not there was a binding contract as soon as the application was filed, there was such binding contract the moment that the 20 per cent was paid. The court say: "In other words, by such payment, this contract with the state became so far executed as to be embraced in the class of contracts protected by section 10 of article 1, of the constitution of the United States, which declares that no state shall pass any laws impairing the obligation of contracts."

The important inquiry here arises whether the case at bar comes within the rules announced in Frisbie vs. Whit-

ney and the Yosemite Valley cases or whether the facts pleaded make a case more nearly akin to Pennoyer vs. McConnaughy. The opinions in Frisbie vs. Whitney and Yosemite Valley cases were based on facts peculair to these cases. The pre-emptor had gone in by force; there was not a single equity in his favor; and he had parted with nothing and the government had received nothing as a consideration for the right claimed. The whole theory of the pre-emption statute is the giving of a gratuity for the benefit of the donee and without any consideration to the government, as the owner of the land, until payment is made. The pre-emptor neither pays a present consideration nor does he undertake such obligation as will form the basis of a contract. But notwithstanding the feeble character of a pre-emptor's claim, the later decisions of this Court have materially limited the application of the doctrine announced in Frisbie vs. Whitney and Yosemite Valley cases, and the rule now is, even in pre-emption cases, that while, no vested right *as against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or acquisition of the land, and rights so acquired, even though inchoate have been repeatedly protected by this Court.

Ard vs. Brandon, 156 U. S., 537; *Shipley vs. Cowan*, 91 U. S., 330-338.

Morrison vs. Stalnaker, 104 U. S., 212; *Duluth & I. R. R. Co. vs. Ry.*, 173 U. S., 587; *19 Sup. Ct. Rep.*, 549.

These later decisions clearly show that the doctrine of Frisbie vs. Whitney and the Yosemite Valley cases should not be extended to conflicting rights between private parties, especially when the party invoking the aid of the court has paid to the government a valuable consideration for the right he claims and such consideration has been accepted and retained.

We believe that the doctrine of Pennoyer vs. McConnaughy applies to the case at bar. The government having offered to dispose of its lands on certain conditions has a substantial interest in protecting itself against fraud. Prior

to 1880 it had offered no special inducement to its citizens to aid it in preventing fraud. But by the second section of the act of May 14, 1880, it has made a standing offer of a certain right to any person who will, *at his own expense*, prove an attempted fraud. Emblen accepted this offer, by instituting this contest. He was then in the attitude of the intending purchaser who had merely filed his application under the Oregon statute in the case of Pennoyer vs. McConnaughy, and if the rule announced by the District Judge in that case were to be adopted, a contract was complete between him and the government the moment the contest was filed. But accepting the rule of this Court in that case, even though the filing of the contest did not make a contract, his subsequent prosecution of the contest and paying the costs thereof did. He offered at one time to withdraw all claim of preference if he would be permitted to contest under the law as it was prior to 1880. This offer the government's representatives declined and thereafter Emblen bore all the expense, paid all costs and succeeded in obtaining a ruling that Weed's entry was fraudulent and holding the same for cancellation. This ruling was never afterwards legally disturbed, and when Congress intervened to affirm Weed's entry the case stood upon the docket of the local land office for trial with Emblen's case made out in chief and the burden resting on the entryman to make his defense.

There was here every element of a contract present in the Oregon case after the 20 per cent had been paid. There was the standing offer of the government; there was Emblen's acceptance of the offer, and there was his payment of the consideration asked by the government. He had thereby acquired a right which should be protected against every person who took title to the land with notice of his equities.

That rights may be acquired by instituting and carrying on a contest, even before it is completed, is further shown by the amendment, adopted July 26, 1892, to the second section of the act of May 14, 1880, providing that after the contest is initiated, it shall not abate by the death of the contestant, but his heirs may continue the prosecution and

they shall be entitled to the same rights as the contestant would have had if his death had not occurred. This amendment was in force for more than two years before Congress attempted to confirm Weed's entry. It would be rather anomalous to say that a contestant's heirs inherit a right from him and that he himself had no right.

But the courts below seemed to be of the opinion that two conditions must be complied with before the complainant could acquire any right. The language of the Circuit Judge is: "Under the act of May 14, 1880, it is the procurement of a cancellation of a previous entry and the payment of the land office fees that creates the right to a preference in the entry of the land upon the part of the contestant. A performance of one only of the conditions is not sufficient. Both conditions are essential in the creation of the right." Here the court overlooked an elementary proposition in the law of contracts, and an elementary rule of equity. Where two parties enter into a contract by which one is to acquire certain rights on the performance of certain conditions, and after he has performed some of the conditioms and is ready, able and willing to perform the balance, the law will not permit the other contracting party to cut off the right by rendering the completed performance of the conditiions impossible, and equity will estop a third party from claiming any benefit from participating in the breach of the agreement. If A and B enter into a contract by which A is to convey certain land to B on the latter's performing two conditions, and after B has performed one of the conditioms and while he is offering to perform the other C with knowledge of B's rights, procures a conveyance of the land from A to himself, C would not be permitted to defend in a court of equity on the ground that B has not performed all the conditions when A and C have by their concerted action rendered such performance impossible.

The courts below also say that the utmost Emblen can claim from the facts stated in his bill is that he might have procured a cancellation of Weed's entry. The bill alleges, and the demurrer admits that Weed's entry was in fact fraudulent, and that Emblen was ready, able and willing to follow up his contest to a final determinatiom. From these

allegations it follows that Emblen not only "*might*," but that he *must* obtain a cancellation of the entry had he been permitted to pursue the contest.

In this connection the courts below show a serious misapprehension of the facts alleged. The opinion contains this language (printed record, p. 36): "He entered the contest against Weed in October, 1886, but never obtained a cancellation of the entry, the decisions of the land department being adverse to him until in December, 1894, Congress passed an act confirming the Weed entry and this made it impossible for the land department to further entertain the contest over the validity of the Weed entry." There were two decisions of the local land offices both adverse to Emblen, but the first was reversed on the merits by the commissioner of the general land office in a ruling holding Weed's entry for cancellation. (Printed record, p. 8), and the second was reversed by the secretary of the interior in a decision approving the ruling of the commissioner of the general land office that the entry was fraudulent and should be held for cancellation (printed record, p. 10.) This last ruling left the contest just where Commissioner Groff's decision had left it with Emblen,s case in chief made out and the burden resting on Weed to make his defense when Congress intervened at the procurement of Weed.

While the lower court did not advert to the contention of defendants that Emblen had lost his rights by the offer to relinquish all claim under the act of 1880, still as they will probably make the same contention here, it may not be out of place for us to anticipate it. That portion of the bill dealing with this subject, will be found in the printed record at pages 16 to 19.

It is shown that by rule 54 of the land department, a contestant claiming a preference right under the act of 1880 must pay all the costs of the contest, while by rule 55, in other contested cases each party must pay only his own costs. Emblen being fearful that he was about to be overwhelmed with costs in the taking of a large amount of irrelevant testimony on the part of the entryman, filed an affidavit of relinquishment coupling the same with a motion

to be allowed to contest under rule 55. On these filings being made the local land officers ruled that Emblen, having commenced as a claimant under the act of 1880, he must retain that status and he would not be permitted to contest in any other way. Thereupon he proceeded under the act of 1880 and rule 54 and paid all the costs. Weed accepted the benefits of this ruling and both Weed and the government by accepting the ruling and reaping the benefit of it should be estopped to claim any advantage from Emblen's offer to relinquish. The affidavit and motion constitute a mere proposal from Emblen. This proposal was rejected. It never became operative. Emblen proceeded at his own costs, prosecuted the case under rule 54, and Weed accepted the benefits of that procedure, and should not now be heard to say that Emblen has lost his rights by making an offer which was never accepted and which was disregarded thereafter by both parties.

On account of the manifest errors of the Court in sustaining the demurrer this judgment ought to be reversed.

Respectfully submitted,

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